APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302 (TPG)

In the Matter Of An Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondent.

FINAL ORDER

1. On February 22, 2002, petitioner Karaha Bodas Company, L.L.C. ("KBC") registered in this District a final judgement against respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") that was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment confirmed the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Others*, YD/IS 60 319, pursuant to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208, which awarded KBC $261,166,654.92, plus interest from January 1, 2001. Pertamina is an Indonesian state-owned oil and gas enterprise.

2. On February 22, 2002, this Court issued on an *ex parte* basis two Writs of Execution and Orders to Show Cause, pursuant to which the Court: (a) permitted KBC to issue restraining notices (the "Restraining Notices"), which

KBC served pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of New York Civil Practice Law and Rules ("CPLR") upon the banks listed in paragraph 3 (the "Garnishee Banks"), which Garnishee Banks KBC alleged held funds owed to Pertamina or in which Pertamina had an interest; (b) authorized certain discovery; and c) ordered Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgement.

3. KBC served the restraining notices upon the following garnishee banks in New York:

Bank of America Corporation f/k/a Bank International
Bank of America National Association
Bank of America Securities
Bank of New York
Chase Securities, Inc.
Dai-Ichi Kangyo Bank, Ltd.
JP Morgan Chase Bank
Bank Indonesia
Bank of Montreal Trust Company
Bank of Taiwan New York Agency
Bank Rakyat Indonesia
PT Bank Central Asia (Persero)
PT Bank Negara Indonesia (Persero) Tbk
PT Bank Mandiri (Persero)

4. On March 25, 2002, the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeared to contest ownership of the restrained assets, and to that end filed a motion to quash (the "Motion to Quash") the Restraining Notices, the Writs of Execution and Orders to Show Cause, and the subpoenas issued by KBC seeking discovery from the Garnishee Banks. The Motion to Quash was fully briefed.

5. On March 23, 2002, Pertamina filed an Opposition to KBC's Writs of Execution and Orders to Show Cause. KBC filed a reply on April 2, 2002.

6. On April 5, 2002 this Court conducted a hearing on: (i) the Order to Show Cause, and (ii) the Ministry's Motion to Quash.

7. For the reasons stated in open court on April 5, 2002, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

A. Trust Accounts Holding Pertamina's Production Sharing Percentage of Gas Sales Revenues

8. The trust accounts listed in this paragraph at the identified Garnishee Bank below: (a) are established pursuant to various Trustee and Paying Agent Agreement; (b) relate to natural gas production projects in Indonesia conducted pursuant to Production Sharing Contracts; (c) contain revenues from natural gas, liquefied natural gas ("LNG") and liquid petroleum gas ("LPG") sales by Pertamina; and (d) are held in Pertamina's name and are subject to the Retention Fee as described in paragraph 12. These trust accounts are restrained under the Restraining Notices:

Trust accounts at Garnishee Bank of America, N.A.:

ARUN II Trust
ARUN III Trust
Bontang Excess Sales MCGC Trust
Bontang Excess Sales AQP Trust
Bontang Excess Sales Korea II Trust
Bontang Excess Sales KCO Trust
Bontang LPG PKG V Trust
Bontang LPG PKG VII Trust
Bontang II Trust
Bontang III Trust
Bontang IV Trust
Bontang V Trust
Bontang VI Trust
East Java Pipeline (PSC Revenue) Trust
ONWJ Trust

9. Each Trust identified in paragraph 8 above receives the sales proceeds arising out of specific Production Sharing Contracts; these sales proceeds are deposited by buyers into the appropriate trust fund account as required by contract. Pursuant to a specific Trustee and Paying Agent Agreement, the Trustee first makes payments and accruals for debt service, reserves, and other expenses and costs. The excess amount left in each general trust account after these payments are made (the "Net Operating Income") is distributed by the Trustee in accordance with the Production Sharing Percentages specified in the Production Sharing Contracts for each producer, a term defined for the Trustee and Paying Agent Agreements to include both Pertamina and the foreign contractors. A Trustee deposits each producer's share of the Net Operating Income in that producer's trust sub-account. Pertamina, as a producer, receives a share of each Production Sharing Contract.

10. The only trust and payment accounts and sub-accounts restrained are those maintained in Pertamina's name or for Pertamina's benefit.

11. Article 5(2) of Indonesian Government Regulation 41/1982 provides that the difference between the share nominally received by Pertamina according to each Production Sharing Contract and a Retention Fee payable to Pertamina as intended in Article 5(1) "shall be the Government's portion." (the "Government's Portion")

12. Article 5(1) of Indonesian Government Regulation 41/1982 provides that Pertamina receives a retention fee out of the proceeds of each Production Sharing Contract. The Retention Fee is equal to five percent (5%) of the Net Operating Income that is generated from each such contract and that is paid to Pertamina and its production sharing partners (the "Retention Fee").

13. The Court finds that Pertamina has a property right in the trust accounts identified in paragraph 8 above, to the extent of its five percent (5%) Retention Fee, which can be executed upon in the manner allowed under New York C.P.L.R. 5222(b).

14. The Court finds that the Government of Indonesia does not have an ownership interest in any of the five percent (5%) Retention Fee, and that the provisions of Indonesian law providing for a tax and a dividend to be paid out of the five percent (5%) Retention Fee do not confer an ownership interest on the Government of Indonesia.

15. The Court finds that the Government of Indonesia has a property right in the "Government's Portion" under Article 5(2) of Government Regulation No. 41/1982 with respect to those funds held in Pertamina's name in the trust accounts identified in paragraph 8 above, and therefore, is entitled to these funds. The trust accounts cannot be executed upon to the extent of the Government's Portion.

16. Accordingly, the Ministry's Motion to Quash is GRANTED and KBC's Motion is DENIED with regard to the trust accounts listed in paragraph 8, as to the Government's Portion. KBC's Motion is GRANTED and the Ministry's Motion to Quash is DENIED only as to the amount of Pertamina's Retention Fee with regard to the trusts listed in paragraph 8.

17. In addition, to the trust accounts listed in paragraph 8, restraints have been placed on the following accounts:

Trust Accounts at Garnishee Bank of America, N.A.:

BLRE Trust
Cilacap Trust
Corridor Trust
East Java Pipeline (Throughput Fee) Trust
KMI Trust
South Sumatra Trust
West Natuna Trust

Trust Accounts at Garnishee Bank of New York:

Exor I Trust
MUSI II Trust

18. The Court finds that the present record is insufficient to determine whether KBC is entitled to execution against these accounts. These accounts, to some extent, raise individual factual issues and, in any event, do not involve the same uniform questions of law raised with respect to the trust accounts listed in paragraph 8.

19. The Court certifies that the order contained in paragraphs 8-16 involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

20. The order contained in paragraphs 8-16 is stayed pending the conclusion of proceedings in the Court of Appeals.

Dated: New York, New York
April 24, 2002

/s/ Thomas P. Griesa
United States District Court Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Docket Nos. 02-7513(L), 02-7515(CON), 02-7547(XAP), 02-7715(CON), 02-7717(CON), 02-7723(XAP).

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondent-Appellant-Cross-Appellee,

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Appellant-Cross-Appellee.

Argued: Aug. 7, 2002.
Decided: Dec. 10, 2002.

Before: CALABRESI, POOLER, and SACK, Circuit Judges.

SACK, Circuit Judge.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-appellant the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeal from an April 26, 2002, memorandum and order issued by the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) insofar as it permits petitioner-appellee Karaha Bodas Com-

pany, L.L.C. ("KBC") to execute against a portion of the funds in several Bank of America trust accounts that are listed in the district court's order. KBC appeals the same order insofar as it denies KBC's motion to execute against the remainder of the same funds. The question on appeal concerns the ownership of the funds in the Bank of America trust accounts, which derive from sales of Indonesian liquefied natural gas ("LNG"), and whether such funds can be attached under New York law, as applicable pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). KBC's claim rests on the allegation that all such funds belong to Pertamina, and on the alternative theory that KBC was entitled to rely on Pertamina's ownership thereof. Pertamina and the Ministry respond that under Indonesian law, the funds belong to the Republic of Indonesia.

We agree with the district court's disposition of the ownership question. The district court correctly analyzed the Indonesian law that controls the ownership of the funds and correctly concluded that most, but not all, of the funds belonged to Indonesia. Accordingly, we affirm.

BACKGROUND

The Parties

KBC describes itself as "a Cayman Islands limited liability company formed by two American power companies and other investors, and is 90%-owned by U.S. investors." Petitioner-Appellee's Br. at 2. The Ministry, acting on behalf of the Government of the Republic of Indonesia, is a "foreign state" within the meaning of the FSIA, 28 U.S.C. § 1603(a).[1] Pertamina is an oil and gas company owned and controlled by

[1] 28 U.S.C. § 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* None of the parties dispute that the Ministry is a foreign state for the purposes of the FSIA.

the Republic of Indonesia. Pertamina engages in oil and gas exploration, extraction, processing, marketing, transportation, and distribution. The 1971 statute creating Pertamina, Law 8 of 1971, explains that the company's goals are "to develop and carry out the exploitation of oil and natural gas . . . for the maximum prosperity of the People and the State.[2] Law of the Republic of Indonesia Number 8 Year 1971, Art. 5. The Indonesian government owns all of Pertamina's equity and controls a supervisory board, constituted pursuant to Law 8, that supervises Pertamina's management.[3] Pertamina, for purposes of the FSIA, is therefore "an agency or instrumentality of a foreign state."[4] 28 U.S.C. § 1603.

---

[2] Pursuant to Government Regulation Number 27 of 1968, Pertamina was initially established as the National Oil and Gas Mining State Enterprise, but was reorganized under Law 8. Prior to Law 8's issuance, the Republic of Indonesia had authorized different state enterprises to extract and sell natural gas and oil pursuant to Articles 5 and 6, of Law 44 of 1960.

[3] Pertamina is currently in a state of legal flux because of changes in its organic statute. Under Law 22 of 2001, Pertamina must, within two years, change "from a state enterprise to a state-owned limited liability company." Decl. of Sudargo Gautama ¶ 37. Law 22 repeals Law 8 and Law 44, but leaves in place implementing regulations that supplement those laws. Draft Law of the Republic of Indonesia Number 22 of 2001, Art. 66. But "Law 22/2001 has not yet been implemented with respect to Pertamina." Supp. Decl. of Sudargo Gautama ¶ 6. The parties' experts on Indonesian law apparently agree that this case should be decided according to the pre-Law 22 regulations. *See* Decl. of Sudargo Gautama ¶ 36; Decl. of Robert N. Hornick ¶ 14.

[4] 28 U.S.C. § 1603 includes any entity in which a government has "a majority of . . . shares or other ownership interest." 28 U.S.C. § 1603(b). "A typical governmental instrumentality . . . is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Pertamina satisfies this description.

The KBC-Pertamina Geothermal Energy Contracts

In November 1994, KBC executed two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Indonesian state-owned entity, Persero, for the development of geothermal energy extraction facilities in the Karaha area of West Java. In these contracts, Pertamina waived "any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may acquire in the future." *See, e.g.*, Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, § 15.8(c). Pertamina also "consent[ed) in respect of the enforcement of any judgment against it." Karaha Geothermal Joint Operation Contract, Art. 21.7(d); Karaha Geothermal Energy Sales Contract, § 15.8(d). The contracts did not contain any representations about KBC's right to attach particular assets in case of default or breach. And KBC points to no evidence, either within the contracts' text or in pre-contract negotiations, that Pertamina made any representations regarding its ownership of LNG revenues or its obligation to provide a security interest. Each contract also contained a choice of law clause specifying Indonesian law and provided that disputes would be resolved by an international arbitral tribunal constituted under the Arbitral Rules of the United Nations Commission on International Trade Law.

In 1997 and 1998, Indonesia experienced a fiscal crisis that induced political instability and the eventual collapse, on May 21, 1998, of the regime led by President Mohamed Suharto. In the course of the crisis, on September 20, 1997, the KBC projects were suspended by an Indonesian "Presidential Decree," along with approximately seventy-four other government-related infrastructure projects. In November 1997, another decree permitted some of the projects to proceed again, but in January 1998, a third decree terminated the KBC projects once more, despite lobbying by KBC and Pertamina, among others.

Arbitration on the Geothermal Energy Contracts

On April 30, 1998, KBC commenced arbitration in Geneva, Switzerland, alleging that the project's termination constituted a breach of the geothermal energy contracts. On September 30, 1999, the Swiss arbitral panel issued a preliminary ruling rejecting Pertamina's objections to arbitration and concluding that all of KBC's claims could be addressed in a unitary proceeding. The arbitral panel also rejected KBC's motion to treat the Republic of Indonesia as a party to the geothermal energy contracts.

In a December 18, 2000, award, the arbitral panel concluded that KBC had been "prevented from pursuing the performance of the binding contracts that it relie[d] upon for reasons beyond its control . . . [and] should not bear the consequences thereof." Final Award in an Arbitration Procedure Between KBC and Pertamina and Persero, at 31. The arbitral panel awarded KBC damages for lost investments of $111.1 million and lost profits of $150 million plus interest and fees. *Id.* at 35-47. On February 1, 2001, Pertamina filed an appeal in the Supreme Court of Switzerland. The appeal was dismissed on April 24, 2002. Pertamina also asked an Indonesian court to enjoin enforcement and annul the award.[5]

Proceedings in the Southern District of Texas

KBC sought enforcement of the award in the United States District Court for the Southern District of Texas pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201-

[5] Pertamina filed suit on March 14, 2002, in Indonesia requesting both annulment of the arbitral award and an injunction preventing KBC from enforcing the arbitral award. A court in Jakarta, Indonesia enjoined KBC from taking action to enforce the judgment anywhere in the world, threatening a $500,000 per diem fine for violations.

208. Rejecting Pertamina's numerous asserted defenses, the district court (Nancy Atlas, *Judge*) entered final judgment on December 4, 2001, in the amount of $261.1 million and interest at the rate of four percent per annum for KBC.[6] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 936, 957 (S.D.Tex. 2001). Pertamina's appeal of that order is pending before the Fifth Circuit.

KBC, in an attempt to enforce the judgment, then moved before the Southern District of Texas to register that judgment in other judicial districts within the United States pursuant to 28 U.S.C. § 1963.[7] KBC filed with the court, among other papers, an affidavit alleging that Pertamina had assets in seven New York banks. Judge Atlas held that KBC had fulfilled the requirement of 28 U.S.C. § 1610(c), that a party seeking to attach a foreign sovereign's property refrain for "a reasonable period of time" after judgment, and permitted KBC to register the judgment in Delaware, New York, and California federal district courts. On February 15, 2002, Judge Atlas also granted KBC's motion for an *ex parte* writ of garnishment against Bank of America.

Proceedings in the Southern District of New York

On February 22, 2002, KBC presented the December 4, 2001, Southern District of Texas judgment for registration to the United States District Court for the Southern District of New York. The same day, the latter court issued an *ex parte* writ of execution and order to show cause pursuant to Fed R.

---

[6] In response to the Indonesian order annulling the arbitral award, *see supra* note 5, Judge Atlas issued her own injunction barring Pertamina from requesting enforcement of the Indonesian order. Tr. of March 29, 2002 Hearing Before Judge Atlas, at 5-6. Judge Atlas's injunction has been appealed to the Fifth Circuit.

[7] 28 U.S.C. § 1963 permits registration of a judgment "when ordered by the court that entered the judgment for good cause shown." *Id.*

Civ. P. 69(a) and 28 U.S.C. § 1610(c) "author[izing KBC] to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date, in total to the sum of $261,166,654.92 plus interest from January 1, 2001." Pursuant to Fed.R.Civ.P. 69(a) and N.Y. C.P.L.R. § 5222(b),[8] the district court issued restraining notices, which KBC subsequently served upon Bank of America and several other banks.

The Nature of the Disputed Funds

This appeal concerns fifteen trust accounts at Bank of America.[9] These accounts contain funds from the sale of LNG extracted in Indonesia under arrangements called Production Sharing Contracts ("PSCs"), which are governed by Indonesian law.

As mandated by Indonesian law, Pertamina enters into PSCs with private oil and gas contractors for the extraction of Indonesian crude oil and natural gas.[10] The Republic of Indonesia is not party to the PSCs, but it must approve them. Under a PSC, the private contractor (the "PSC contractor") is responsible for all exploration, development, extraction, production, transportation, and marketing operations related to a

---

[8] Rule 69(a) provides, "Process to enforce a judgment for the payment of money shall be a writ of execution. . . . The procedure on execution . . . shall be in accordance with 'the practice and procedure of the state in which the district court is held. . . .'" Fed.R.Civ.P. 69(a).

[9] The district court's analysis (and hence this appeal) does not concern trusts "containing non-PSC Operating Income: the Musi II, Exor 1, Cilacap and the throughput fee portion of the East Java Pipeline trusts." Final Order ¶ 17. The district court concluded that the record was "insufficient to determine whether KBC is entitled to execution against these accounts." Id. ¶ 18.

[10] Geothermal energy contracts and PSCs are different. Pertamina entered into geothermal energy contracts with KBC for the purposes of developing extraction facilities. Pertamina entered into PSCs with private oil and gas contractors for the purposes of extracting oil and natural gas.

specified geographic area under Pertamina's management. As part of their compensation, PSC contractors initially receive a share of the oil or natural gas after extraction. They then transfer the remaining oil or gas to Pertamina.

PSC contractors must deliver the extracted natural gas to Pertamina, which then transports the gas for domestic sale or for conversion into LNG at liquefaction plants. Pertamina sells LNG to foreign buyers pursuant to long-term sales contracts that contain choice of law clauses specifying New York law as governing the contracts. LNG sales were the "largest single source of Pertamina sales revenue" in the last nine months of 2000. Decl. of Robert N. Hornick ¶ 22. Buyers of LNG remit payment to specified trust accounts in New York. In all such LNG sales, Pertamina, in its own name, purports to transfer title to the LNG, or title to the refined product, to the buyer. Pertamina warrants that it has "good title to the [LNG], free of all liens and encumbrances of any kind." *Id.* ¶ 23(b). Revenues from sales of natural gas are also sent to trusts in New York. The trusts "distribute the proceeds in accordance with trust agreements and ultimately to the [PSC contractor] in accordance with their respective [PSCs]." Decl. of Sahala L. Gaol ¶ 9. However natural gas is sold, and whether or not it is liquefied, proceeds from sales are first paid into trust accounts such as those at Bank of America.

Bank of America is the trustee of the accounts deposited with it. Before making any allocations or distributions, it credits all LNG revenues from a particular project, or subpart of a project, to a general account. The general accounts and other subaccounts are operated pursuant to contractual arrangements known as Trustee and Paying Agent Agreements ("TPAA") that define the trustee's obligations. TPAAs are signed by Bank of America, Pertamina, and relevant PSC contractors, but only Pertamina has authority to direct payment. *See, e.g.*, Bontang V Trustee and Paying Agent Agreement of July 1, 1995, Art. 3.5(b)(i). Like the LNG sales

contracts, the TPAAs also contain choice of law clauses specifying New York law as governing. *Id.* Art. 13.6.

Before any distribution can be made to Pertamina or the PSC Contractor, the TPAAs specify that production expenses—which include debt service payments, production costs, and trustee expenses—are paid first. *Id.* Art. 3.3-3.4. After production payments are made, the "PSC Revenue" or the "Net Operating Income" remains in the general trust account. This remainder is essentially the net profit from the PSC, after costs have been deducted and debts have been serviced.

The PSC Revenue is then divided between Pertamina and the PSC Contractor for a particular project in contractually specified portions known as "Production Sharing Percentages." These payments are made to separate subaccounts or separate line accounts within the general trust account. *Id.* at 8. The funds at issue in this appeal are, thus, Pertamina's Production Sharing Percentage or, in the terms used in the contracts, Pertamina's share of the Net Operating Income.

Pertamina's Production Sharing Percentage is transferred directly to the Republic of Indonesia. Indeed, "Pertamina at the direction of the Indonesian Government, has issued standing instructions to the Trustee to pay its Production Sharing Percentage to an account of the Government of Indonesia at Bank Indonesia." Decl. of Ainun Na'im ¶ 23. Evidence submitted by the Ministry and Pertamina suggests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

The LNG Security Arrangement

One noteworthy feature of the trust arrangements is the mechanism whereby Pertamina borrows funds for the con-

struction of natural gas liquefaction facilities, without requiring a counter-party lender to depend on Pertamina's willingness or ability to assure repayment. For example, the record contains 1997 loan agreements for funds to create a natural gas liquefaction facility. One loan agreement explains that "certain proceeds of liquefied natural gas" that are held in trust accounts at Bank of America are the "*sole* source of repayment." Bontang VI Loan Agreement of March 4, 1997, at 2 (emphasis added). A fixed percentage of gross revenues from LNG revenues in the trust accounts is therefore allocated to loan repayment, and only after loan repayments are complete can other disbursements be made. Through this device, the LNG revenue stream structure protects lenders' interests.

The District Court Opinion and Order

On March 23, 2002, Pertamina filed papers opposing KBC's order to show cause for a writ of execution on the ground that none of the restrained accounts contained property owned by Pertamina. The previous day, the Ministry, purporting to be a "Non-Party with Interest," had also filed a memorandum of law arguing that the restraining notices and writs of execution should be quashed.

Following supplementary briefing, the district court held a non-evidentiary hearing on April 5, 2002, and delivered an oral decision on the ownership and disposition of the restrained funds in the trust accounts. According to the district court, "the ultimate ownership of the money . . . does not have to appear in the trustee and paying agent agreement," so the TPAAs' designation of Pertamina as trust owner was not dispositive. Tr. of April 5, 2002 Hearing, at 10-11. Nor could Pertamina's practice of paying the funds directly to the Republic of Indonesia dispose of the question. *Id.* at 51. The district court reasoned instead that the ownership of the LNG revenues in Pertamina's subaccount was a matter of Indonesian law, which explicitly allocated ownership rights in the

funds. *Id.* at 80-81. Canvassing Indonesian law, the court concluded that Article 5(2) of Government Regulation 41 of 1982 vested ownership of all funds, except for a portion called the "Retention," in the Republic of Indonesia. "What is decisive on the question of property rights is a provision of Indonesian law which became effective in 1982 and article 5 of that law." *Id.* at 81. It allocated Pertamina's Production Sharing Percentage, less five percent of the Net Operating Income (which is designated Pertamina's "Retention"), to the Republic of Indonesia. This 1982 law, noted the district court, distinguished the Republic of Indonesia's interest from Pertamina's tax and dividend obligations. *Id.* at 83. Therefore, the only portion of the funds that KBC could attach was the five-percent portion—i.e., the Retention—which belonged to Pertamina. The district court memorialized its decision in a written order on April 26, 2002.

This Appeal

Pertamina and the Ministry appeal the district court's order and challenge its conclusion that the Retention is owned by Pertamina. The Ministry also contends that once the district court had concluded that the remaining funds belonged to the Republic of Indonesia, sovereign immunity foreclosed any further restraint of those funds. KBC appeals the portion of the order that is based on the district court's conclusion that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage.

On June 18, 2002, we denied KBC's motion to dismiss the appeal, and permitted both the Ministry and Pertamina to appeal pursuant to either 28 U.S.C. § 1292(b), the collateral order doctrine, or both. We observed that the collateral order doctrine might apply because this appeal raised an issue of sovereign immunity, but expressly reserved judgment on the jurisdictional issues. Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment.

DISCUSSION

I. Standard of Review

In a proceeding under the FSIA, "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." *Filetech S.A v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir.1998). *De novo* review is appropriate even where the district court supplements the complaint with "undisputed facts from the record," as the court did here. *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 138 (2d Cir.2001) (citation and quotation marks omitted).

"Likewise, pursuant to Fed. R.Civ.P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to *de novo* review." *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir.1998). Finally, the district court's choice of law determination is also subject to *de novo* review. *Id.*

II. Subject Matter Jurisdiction

Prior to consideration of the appeal's substance, we address two threshold subject matter jurisdiction questions: whether our statutory subject matter jurisdiction properly obtains and whether the Ministry is a proper party on appeal.

A. Statutory Appellate Jurisdiction

Ordinarily, appeals are permitted only from "final decisions of the district courts." 28 U.S.C. § 1291. One exception to this rule, contained in 28 U.S.C. § 1292(b), however, permits appellate jurisdiction over interlocutory civil orders "[w]hen a district judge . . . [is] of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and so certifies in a written order. 28 U.S.C. § 1292(b). Upon entry of such an

order, the court of appeals has the discretion to accept or decline jurisdiction. *Id.*

On April 24, 2002, the district court certified this case for appeal under 28 U.S.C. § 1292(b). Final Order of April 24, 2002, at 6. The prerequisites for appellate jurisdiction are satisfied. First, the interaction of federal, New York, and Indonesian law poses "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Second, our review of the district court's order will advance the litigation by resolving the disposition of funds that allegedly belong to a foreign sovereign. Pursuant to our discretion under 28 U.S.C. § 1292(b), we therefore accept jurisdiction to hear this appeal.[11]

B. The Ministry as Appellant

KBC did not name the Ministry as a party in its action to enforce the Swiss arbitral award in the Southern District of Texas. *KBC*, 190 F.Supp.2d at 939. Judge Atlas's final order names only Pertamina as a respondent. And the order certified in the Southern District of New York on February 22, 2002, again mentions Pertamina alone. Not until March 22, 2002, after the funds in the Bank of America trust accounts were attached, did the Ministry appear in the district court, then characterizing itself as a "Non-Party with Interest."

At first blush, the Ministry's absence from the initial proceedings and its failure to intervene pursuant to Fed. R.Civ.P. 24 seem to preclude its participation in this appeal. "[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). But, as the Supreme Court recently made clear, the

---

[11] Having accepted jurisdiction under 28 U.S.C. § 1292(b), we need not determine whether the collateral order doctrine provide an alternative vehicle to hear this appeal. *See Excimer Assocs. v. LCA Vision, Inc.*, 292 F.3d 134, 138 (2d Cir.2002) (describing the collateral order doctrine).

Ministry is indeed a "party" to the district court's judgment for present purposes, and can therefore properly appeal.

In *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 2008, 2013, 153 L.Ed.2d 27 (2002), the Court held that an unnamed member of a class could appeal a class action settlement at a fairness hearing even though he had failed to intervene earlier. The Court cautioned that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 2010. To determine who may appeal, courts must ascertain whether putative appellants are "bound by the order from which they were seeking to appeal." *Id.* In *Devlin*, for instance, the appellant faced a "final decision of [a] right or claim sufficient to trigger his right to appeal." *Id.* (citation and internal punctuation omitted).

Similarly, we have long allowed appeal "when the nonparty has an interest that is affected by the trial court's judgment." *United States v. Intl Bhd. of Teamsters*, 931 F.2d 177, 183-84 (2d Cir.1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir.1986), *aff'd, Marino v. Ortiz*, 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)); *accord West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir.1934). "The question therefore is whether the putative appellant can identify an 'affected interest.'" *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir.1999). The Ministry alleges that the Republic of Indonesia owns the property encompassed by the garnishment order. Under Devlin, *Kaplan*, and similar cases, this constitutes an "affected interest," which entitles the Ministry to join this appeal.

III. Execution Against or Attachment of Foreign Sovereigns' Property

Attachment of a foreign state's property in the United States is governed by the FSIA. In relevant part, the FSIA provides that "the property in the United States of a foreign

state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of [the FSIA]." 28 U.S.C. § 1609. Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other. First, 28 U.S.C. § 1610(a) provides that any property of a foreign sovereign that is

> used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. Second, § 1610(b), which concerns foreign states' instrumentalities, such as Pertamina, provides in relevant part that:

> any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . if . . . (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver.

Id. Subsection (a) is generally thought to be narrower than subsection (b). *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252-65 (5th Cir.2002). While subsection (b) applies to *all* property of the agencies and instrumentalities of foreign states, subsection (a) applies only to the property of foreign states that is "used in commercial activity." *Id.*

In the appeal before us, sample geothermal energy contracts between Pertamina and KBC state that Pertamina "waive[s] any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future." Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, Art. 15.8(c). Pertamina, through its use of the trust funds to channel LNG revenues, engages in commerce in New York. Under 28 U.S.C. § 1610(b), Pertamina has thus waived its sovereign immunity from attachment in United States courts.[12]

A. Attachment Under the FSIA and New York Law

The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo*, S.A., 190 F.3d 16, 20 (2d Cir.1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." *Alliance*, 190 F.3d at 20. "New York procedure for enforcement of judgments is set out in Article 52 of the Civil Practice Law and Rules. The first section of Article 52 describes the assets that New York law has made subject to enforcement, and thus available to judgment credi-

---

[12] Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us.

tors." *Id.* The relevant provision, N.Y. C.P.L.R. § 5201(b), states that:

> **Property against which a money judgment may be enforced.** A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

Id. In New York, then, a party seeking to enforce a judgment "stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Bass v. Bass*, 140 A.D.2d 251, 253, 528 N.Y.S.2d 558, 561 (1st Dep't 1988). Nonetheless, a party cannot "reach . . . assets in which the judgment debtor has no interest." *Id.* A determination of Pertamina's property interest in the disputed funds—i.e., whether Pertamina can "assign or transfer" any of these funds—is therefore dispositive of this appeal. N.Y. C.P.L.R. § 5201(b).

B. Ownership of the Disputed Funds

While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds. KBC argues that under New York law, Pertamina owns the Production Sharing Percentage because Pertamina controlled the allocation of the funds within the trust accounts and retained initial title to the LNG, which it sold to generate the disputed funds. KBC finds no significance in the fact that much of those funds flow to the Republic of Indonesia. In KBC's view, these funds merely represent "various royalties, taxes, and dividends" which "Pertamina is obligated to pay the Government." Decl. of Robert N. Hornick ¶ 24. KBC argues that before those obligations are met, the funds belong to Pertamina. KBC's expert also argues that Indonesian law does not vest the Re-

public of Indonesia with any ownership interest in these funds. *See id.* at ¶¶ 24-49.

Both Pertamina and the Ministry argue to the contrary that Indonesian law deprives Pertamina of all but a future property interest, limited to five percent of the Net Operating Income, while the Republic of Indonesia has the exclusive right to the rest of Pertamina's Production Sharing Percentage. They, like the district court, identify Government Regulation 41 as providing the dispositive rule of decision:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article *shall be the Government's portion.*

Government Regulation of the Republic of Indonesia Number 41 of 1982. Art. 5 (emphasis added). According to Pertamina's expert, "[t]his [provision] means that the Government owns the Percentage Share due to Pertamina under the PSC but must pay Pertamina the five percent fee," or Retention. Supp. Decl. of Sudargo Gautama ¶ 4.

Pertamina also argues that even the Retention, which equals five percent of the Net Operating Income, cannot be attached. Pertamina contends that before it transfers its Production Sharing Percentage to the Republic of Indonesia, the latter *owns* all the PSC Revenue as a result of Government Regulation 41. Only after the revenue reaches Jakarta does Pertamina receive the Retention. And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates

payment of a fifty percent dividend to the government. In all, Pertamina actually receives one fifth of the Retention.[13]

Resolution of this appeal requires that we determine the legal ownership of the PSC Revenues. At the threshold, we must consider which choice of law rule governs the question of ownership.

IV. Choice of Law Analysis

A. Federal or State Choice of Law Rules

"[R]ather than directing courts to apply the choice of law rules of the place of [the relevant events], the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir.1991); *accord Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir.1996) ("[T]he FSIA . . . operates as a 'pass-through' to state law principles."). In *Barkanic*, we reasoned that the FSIA "expressly embraces the goal of holding foreign states liable in the same manner and to the same extent as a private individual under like circumstances." *Barkanic*, 923 F.2d at 960 n. 3 (internal citation and quotation marks omitted). *Barkanic* suggests that New York choice of law rules govern.

The Ministry argues that *Barkanic* applies only to questions of "liability," and does not extend to questions about "the amenability of the sovereign to suit." Ministry Reply Br.

---

[13] For instance, if the PSC Revenue were $100, the Pertamina's retention would be $5, or five percent. Under the terms described in Pertamina's annual reports, though, the PSC Revenue would be divided: $35 would go to the PSC contractor, and $65 would go to Pertamina in New York, then be transferred immediately to the Ministry in Jakarta. Once the $65 reached Jarkarta, Pertamina would receive $5. After taxes and dividends, however, Pertamina would only retain $1.

at 16. The latter questions, the Ministry argues, are governed by federal common law choice of law rules. *Id.* (emphasis omitted). But in *Barkanic*, we explained that in FSIA cases, we use the forum state's choice of law rules to resolve "*all* issues," except jurisdictional ones. *Barkanic*, 923 F.2d at 959, 961 (emphasis added). Determining what property Pertamina owns is not a jurisdictional question, which would require application of federal law. Jurisdiction has already been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity. Like the *Barkanic* court, we now determine only the scope of recovery.[14] New York choice of law rules therefore govern our decision.

B. New York or Indonesian Property Law

Under New York law, "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. and Stolarz*, 81 N.Y.2d 219, 223, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904, 905 (1993); *accord Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998). In property disputes, if a conflict is identified, New York choice of law rules require the application of an "interests analysis," in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and [ ] the facts or contacts which obtain significance in defining

---

[14] Any "resort to federal common law to fill the interstices of our federated legal system, must be warranted by overriding and compelling federal concerns." *Pescatore*, 97 F.3d at 10 (citation and internal quotation marks omitted); *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (noting that "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted") (citation and internal quotation marks omitted). The Ministry's proffered interest, the uniform application of federal law, Ministry Reply Br. at 16, is "insufficient to justify imposition of federal common law," because of its "generic" and "generalized" nature. *Pescatore*, 97 F.3d at 11 (citing *O'Melveny*, 512 U.S. at 88, 114 S.Ct. 2048).

State interests are those which relate to the purpose of the particular law in conflict." *Koreag, Controle et Revision S.A. v. Refco F/X Assoc. Inc.*, 961 F.2d 341, 350 (2d Cir.), *cert. denied*, 506 U.S. 865, 113 S.Ct. 188, 121 L.Ed.2d 132 (1992) (citation omitted); *see also Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 348, 581 N.E2d 1042, 1044, 575 N.Y.S.2d 796, 798 (1991) (applying interests analysis); *In re Estate of Clark*, 21 N.Y.2d 478, 485-86; 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998 (1968) (same); *In re Crichton's Estate*, 20 N.Y.2d 124, 133, 228 N.E.2d 799, 805-06, 281 N.Y.S.2d 811, 819 (1967) (same); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 279 A.D.2d 408, 408-09, 720 N.Y.S.2d 102, 103-04 (1st Dep't 2001) (same).[15]

1. Actual Conflict of Law. In the case at bar, the Republic of Indonesia and the State of New York apply the same general rules to property disputes. The Republic of Indonesia offers the only specific rules-Indonesian statutes and regulations—that determine the respective rights of Pertamina and the Republic of Indonesia in the disputed funds. New York law directs us to apply these Indonesian statutes and regulations. There is thus no actual conflict of law.

Under New York law, the party who possesses property is presumed to be the party who owns it. *See Pollock v. Rapid Indus. Plastics Co.*, 113 A.D.2d 520, 525, 497 N.Y.S.2d 45, 49 (2d Dep't 1985) (noting that "possession of tangible property . . . creates a rebuttable presumption of ownership"). When a party holds funds in a bank account, possession is established, and the presumption of ownership follows. *See Kolodziejczyk v. Wing*, 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (4th Dep't 1999) (joint bank account creates rebutt-

---

[15] KBC argues that "the law of the situs of the disputed property generally controls." Appellee's Br. at 34. (citing 19A N.Y. Jur.2d Conflict of Laws §§ 26, 27, 31). But the New York Court of Appeals explicitly rejected the "traditional situs rule" in favor of interest analysis in *Istim*, 78 N.Y.2d at 347, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798.

able presumption of ownership in joint possessors); *Perkins v. Guaranty Trust Co. of New York*, 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates creates rebuttable presumption of ownership).

Similarly, the Indonesian Civil Code provides that "whoever is in control of movable goods . . . shall be deemed to be the owner of such goods," Indonesian Civ. Code, art.1977, and the phrase "movable goods" includes cash held in bank accounts, Decl. of Robert N. Hornick ¶ 34.

Pertamina possesses the disputed funds. Under both New York and Indonesian law, we therefore proceed from the presumption that Pertamina owns the disputed funds. It is clear, however, that this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee.[16] *See Fragetti v. Fragetti*, 262 A.D.2d 527, 527-28, 692 N.Y.S.2d 442, 443 (2d Dep't 1999) (holding that joint bank account created presumption of joint ownership, which was rebutted by contrary evidence of the parties' intentions and relative control over the funds); *Vergari v. Kraisky*, 120 A.D.2d 739, 740, 502 N.Y.S.2d 788, 789 (2d Dep't 1986) (holding that certificate of title constituted prima facie evidence of ownership of a vehicle, which was rebutted by contrary evidence of the parties' relative dominion and control over the vehicle); *Kurtish v. Iskokovic*, 204 A.D.2d 847, 848, 612 N.Y.S.2d 263, 264 (3d Dep't 1994) (holding that a "constructive trust" exists between two parties when there is: (1) a confidential or

---

[16] As the district court stated, Pertamina's possession of the disputed funds "is not the end of the story. Under absolute Hornbook law, the Court must look past that and must recognize any property rights in that money which belong to any other parties . . . such as the right of a beneficiary to a trust or some similar kind of property right." Tr. of April 5, 2002 Hearing, at 80. KBC does not advance any contrary proposition of Indonesian law. *See* Petitioner-Appellee's Br. at 41, 44.

fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment); *Mendel v. Hewitt*, 161 A.D.2d 849, 850, 555 N.Y.S.2d 899, 900 (3d Dep't 1990) (stating that to determine whether a "constructive trust" exists, courts conduct "flexible" factual inquiries into the relationships between parties); *cf.* Dec. of Robert N. Hornick ¶ 34 (stating that under Indonesian law, possession establishes a presumption of ownership, but not stating that the presumption is irrebuttable). Under New York law, then, the property rights are determined by the underlying relationship between Pertamina and the Republic of Indonesia.

KBC urges us to apply New York law to this relationship, and thus, to the property rights in the disputed funds. Yet KBC has not pointed to any New York cases or statutes that purport to govern this kind of arrangement. The Republic of Indonesia is a foreign state, and Pertamina is a corporate entity of Indonesia, created by the legislative enactments and executive orders of the Republic of Indonesia. The relationship was created neither by contract nor by any other mechanism familiar to the laws of New York. It was established instead by provisions of Indonesian law uniquely applicable to the relationship itself:, Law of the Republic of Indonesia Number 8 Year 1971 and Government Regulation of the Republic of Indonesia Number 41 of 1982. Under New York law, the meaning of these two provisions of Indonesian law determines the property rights of the parties. There is thus no actual conflict between the laws of New York and the laws of Indonesia.

2. Interests Analysis. In any event, even if there were such a conflict, we are confident that Indonesian law would govern under the "interests analysis" that would be applicable under New York choice of law rules. *Cf. Allstate*, 81 N.Y.2d at 225, 613 N.E.2d at 938, 597 N.Y.S.2d at 906 (holding that "there is no conflict between New York and New Jersey law," and that even if there were a conflict, "New Jersey law

[would] govern[]"). As the New York Court of Appeals has explained,

> Applying interests analysis, we first look to the purposes of the statutes in conflict and identify the policies which the States seek to promote through application of their laws. Then, based upon the facts of the case which relate to the statutes' purpose, we determine which State has the greater interest in having its law applied.

Istim, 78 N.Y.2d at 348, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798. In the case at bar, Indonesian law sets forth a set of rules specifically resolving the ownership and disposition of the particular funds indispute. *See, e.g.*, Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5; Law of the Republic of Indonesia Number 8 Year 1971, Art. 15; *see also* Decl. of Sudargo Gautama ¶¶ 29-39 (describing the regulation of PSC revenues). More generally, Indonesian laws also reflect a significant national interest in the eventual fate of funds from LNG exploitation. An Indonesian Constitution "Elucidation" observes, "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art. 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8 Year 1971. And, unlike New York's interests, Indonesia's interests implicate the particular circumstances at issue: the use of an Indonesian governmental instrumentality to generate funds in order to maintain satisfactory foreign exchange reserves.

In contrast, the New York statutory interests implicated here are relatively attenuated: (i) the creation and operation of trusts under New York law; (ii) the execution of sales contracts that operate under New York law to obtain funds for deposit in these trusts; (iii) New York's general interest "in

defining and protecting the property interests of its citizens and those who do business there," *Koreag*, 961 F.2d at 351; and (iv) New York's "interest as an international clearing-house and market place," *Indosuez*, 279 A.D.2d at 408-09, 720 N.Y.S.2d at 104 (citation and internal quotation marks omitted).

Moreover, these generic interests are only minimally implicated in this case. Both the LNG sales contracts and the trust mechanism complete their operations before funds arrive in Pertamina's subaccount. Whatever interest New York has in proper application of its contract or trust law has *de minimis* application here. And we do not see how a decision to apply New York law would materially further New York's reputation as a cosmopolitan, as opposed to insular and provincial, financial center. Indeed, if this latter reason alone sufficed to mandate New York law, courts would never apply foreign law to cases involving property located in New York bank accounts, which has clearly not been the case. *Cf., e.g., Clark*, 21 N.Y.2d at 485-86, 236 N.E.2d at 156, 288 N.Y.S.2d at 998 (applying Virginia law to determine the ownership of property located in New York).

We conclude that even if there were a conflict between New York and Indonesian law, New York choice of law rules would mandate application of Indonesian law to determine the relative property interests of Pertamina and the Republic of Indonesia in the disputed funds.

V. The Property Interests of the Republic of Indonesia and Pertamina in the Restrained Funds

There is some uncertainty about the theory pursuant to which KBC presses its claim to the attached funds. On the one hand, KBC argues that the disputed funds belong to Pertamina even as a matter of Indonesian law, and consequently can be attached. This theory of recovery therefore rests on the ownership of the disputed funds. On the other

hand, KBC, in its brief and at oral argument, also suggested that it had been entitled to rely on Pertamina's ownership of the LNG funds, and due to that reliance, is now entitled to attach those funds, without regard to the funds' legal ownership.

We reject both arguments. Like the district court, we conclude that under Indonesian law, all of the disputed funds except for the Retention belong to the Republic of Indonesia, and that it would have been unreasonable for KBC to rely on the notion that Pertamina owned those funds.

A. The Reliance Argument

KBC's reliance argument appears to run as follows: The Republic of Indonesia has established Pertamina as a separate legal entity, comparable to a private corporation, in order to do business with various other entities in international markets. When those entities make serious claims against Pertamina's assets, however, Pertamina disclaims ownership, and invokes the sovereign immunity protections of the Republic of Indonesia. KBC hints that Pertamina was a vehicle for the Republic of Indonesia to participate in international markets without fairly accepting the consequences of such participation.

This argument rests on the premise that when KBC entered into the geothermal energy contracts, KBC relied upon Pertamina's ownership of the disputed funds, and that it was reasonable for KBC to do so. We can find no evidence in the record to support these claims.

KBC has not elicited evidence from which a court could conclude that KBC actually relied upon any representation that Pertamina made about KBC's ability to recover from the disputed funds in the event of default. KBC does not allege that before or during the negotiation of the geothermal energy contracts, Pertamina made any oral or written representation about recovery in the event of default. The geothermal energy

contracts contain no reference to Pertamina's obligations to make funds available in the event of default, nor do they make any mention of LNG revenues. Neither Pertamina's separate legal status nor its previous title to the LNG supports the notion that Pertamina represented that it owned the disputed funds, or that the funds were available to KBC to satisfy a default. Moreover, neither fact establishes that Pertamina owns the proceeds from LNG sales, free of any prior obligations to the Republic of Indonesia.[17]

None of Pertamina's representations and actions, as reflected in the record, support the inference that Pertamina had an ownership interest in the disputed funds. To the contrary, Pertamina seems to have been entirely forthright about its lack of ownership rights. Pertamina's annual report, for example, states that "[r]evenue from LNG sales, after deduction of contractually agreed cost items, is shared between the Government (65%) and the contractor (35%). From the LNG operations *PERTAMINA earns one thirteenth (1/13) or approximately 5% from the Government's share.*" *Pertamina Annual Financial Report 2000*, at 17 (emphasis added).

Although the TPAAs do not denominate the Republic of Indonesia as owner of the LNG proceeds, Pertamina presents undisputed evidence that it has consistently transferred all of its Production Sharing Percentage to the Republic of Indo-

---

[17] Nor can KBC rely on the structure or denomination of the disputed accounts at issue here to establish reliance. There is no evidence that KBC knew of the existence of the Bank of America trust accounts, let alone that it relied on their existence when contracting. KBC sought permission from the United States District Court for the Southern District of Texas to register its judgment in Delaware and California in addition to New York. Memorandum and Order of February 20, 2002, at 7. In New York alone, KBC served restraining notices on no less than seven banks. Writ of Execution and Order to Show Cause of February 22, 2002, at 5. This broadside approach suggests that KBC, while perhaps aware that LNG revenues existed and flowed through New York, knew nothing of these accounts, let alone who established or controlled them.

nesia's account at the Federal Reserve Bank of New York. And it was widely understood that the Republic of Indonesia relied on LNG funds to maintain its foreign currency reserves, which would have been more difficult had the funds belonged to Pertamina, rather than the Republic itself. *See* Decl. of Sahala L. Gaol. ¶¶ 11-12.

Further, the evidence of the LNG contracting process suggests that other persons dealing with Pertamina thought that Pertamina could not be relied on as a creditor. The LNG financing structure was designed to assure parties contracting with Pertamina that—while doing *LNG business* with Pertamina—they would not be left without financial recourse in the case of default. For instance, when money was needed to construct Pertamina's liquefaction facilities, the loan was *not* made directly to Pertamina. Rather, it was made to the trustee, Bank of America. The loan contracts described the "Borrower" as "Bank of America National Trust and Savings Association, solely as Trustee under the Trust Agreement [but) not in its individual capacity" and not "any one or more of the Producers (defined to include Pertamina]." Bontang VI Loan Agreement of March 4, 1997, at 4. The loan agreements further specified that debt payments must be made from the LNG proceeds in the trust *before* Pertamina or the PSC contractor obtain any profit. *Id.* at 18-19. The loan agreements therefore warranted that the borrowers' interest had priority over all other "obligations and liabilities," *id.* at 38, and the TPAAs provided for payment to Pertamina and the PSC contractor only *after* such debts were satisfied, *see, e.g.*, Bontang VI Trustee and Paying Agent Agreement of March 4, 1997, at 39. PSC contractors' interests were also protected through the trust such that they did not need to rely on access to Pertamina's assets in order to be paid. See Decl. of Ainun Na'im ¶ 22; Decl. of Robert Hornick ¶ 23(c). The TPAA mechanism thereby ensured that parties involved in the production of LNG never needed to rely on the independence and financial viability of Pertamina nor contend with Perta-

mina's potential sovereign immunity assertions, nor its willingness to comply with adverse judgments.

Other sophisticated commercial counter-parties thus expressly sought contractual mechanisms to guarantee recovery without reliance on the accessibility of Pertamina's assets. This suggests that even if KBC had actually relied upon Pertamina's ownership rights, such reliance would not have been reasonable. Others were aware of complexities in the relationship between Pertamina and the Republic of Indonesia, and consequent limits on Pertamina's ability to satisfy judgments against it. We would think that KBC, no less than others, could have arranged similar protections. Having failed to bargain for such protection before the fact and having failed to identify any actual reliance, KBC now asks us in effect to rearrange *nunc pro tunc* the relations of Pertamina and the Republic of Indonesia in KBC's favor. In these circumstances, we see no reason why a sophisticated commercial entity should not be required to abide by the consequences of its bargain. We therefore reject KBC's reliance argument.

B. The Property Interest Argument

As described above, the crux of the parties' disagreement about Indonesian law hinges on a provision of Government Regulation 41:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5. This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia. Thus, we agree that most of "the share denominated as 'Pertamina's' share under the PSCs belongs entirely to the Government," Decl. of Sudargo Gautama ¶ 4, with the exception of the Article 5(1) Retention. KBC responds that "the 'Government's Portion' referenced in [Government Regulation 41] is not a property interest [but] simply a reference to the 'indebted obligations' [already] owed by Pertamina to the Government of Indonesia." Petitioner—Appellee's Br. at 46 (emphasis omitted). KBC contends that Law 8, the statute under which Regulation 41 was passed, creates these "indebted obligations." *Id.* at 14-16. Article 15 of Law 8 states that Pertamina's deposit of sixty percent of Net Operating Income from PSCs "shall constitute the payment" of corporate tax, various levies, and other contributions. Law of the Republic of Indonesia Number 8 Year 1971, Art. 15. KBC argues that the amount that Pertamina owes to Indonesia in taxes, levies, and contributions is the "Government's portion." The disputed funds are, in KBC's view, owned by Pertamina and owed to Indonesia.

But KBC's interpretation of Article 5 of Government Regulation 41 is inconsistent with the surrounding statutory text. While Article 5(2) identifies in mandatory terms what "shall be the Government's portion," the very next provision imposes a "tax," which it explicitly labels as such. Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5(3). The presence of a parallel provision explicitly referencing "tax" obligations suggests that Article 5(2) describes a different kind of obligation. The terminology of Article 15 of Law 8 underscores this inference: It refers to payments that "constitute" corporate taxes, customs levies, and the like, Law of the Republic of Indonesia Number

8 Year 1971, Art. 15, which are distinguished from other obligations.

Further, Article 5(2) of Government Regulation 41 and Article 15 of Law 8 refer to different amounts. The former, which creates the "Government's portion," refers to the "*difference* between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina." Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). That is, the Government portion comprises, with respect to each PSC, the total amount of the Net Operating Income, *less* the amount to which the particular PSC contractors are entitled, *less* five percent of the Net Operating Income—a sum that depends upon the exact percentage to which contractors are entitled under the PSC. And, as KBC's counsel explained at oral argument, this percentage varies from contract to contract, so that the "Government's portion" also varies above and below sixty percent of Net Operating Income. Thus, the "Government's portion" is a varying amount.

Article 14 of Law 8, in contrast, refers to a *fixed* "sixty percent of the net operating income from the operations of Production Sharing Contracts prior to the division between the Enterprise and the Contractor." Law of the Republic of Indonesia Number 8 Year 1971, Art. 14. The *fixed* sixty percent that is Law 8's "indebted obligation" therefore cannot be the same thing as the *varying* percentage of the Net Operating Income that is the "Government's portion."[18]

---

[18] Despite this discrepancy, KBC's expert argues that "Article 14 and 15 [of Law 8] were implemented by [Government Regulation 41]." Decl. of Robert Hornick ¶ 27. But as a matter of Indonesian law, government regulations are not implementing mechanisms for legislation. Indonesian law contains "a bewildering variety of types of laws—statutes, regulations, decrees, circulars, etc." Eddy Damian & Robert N. Hornick, *Indonesia's Formal Legal System: An Introduction*, 20 Am. J. Comp. L. 492, 523 (1972). Among the varieties of law enumerated in the aforementioned

The record also contains uncontroverted evidence that Pertamina's share of the Net Operating Income is transferred directly to the Ministry's account at the Federal Reserve Bank of New York.[19] While this does not prove that the Republic of Indonesia has an ownership interest in such funds, it is consistent with such a conclusion.

We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference. *See, e.g.. Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir.1999), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000) ("Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations."); *see also In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir.1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."). That Indonesia is a party to the case

---

article are "Government Regulation[s]," "Presidential Decision[s]," "Regulation[s] of the Minister," and "internal memoranda." *Id.* at 524-25. This plethora of legal instruments in part ensues because the Indonesian executive branch has "considerably more executive law-making discretion than is the case, e.g. in the legal system of the U.S." *Id.* at 529. And under Indonesian law, "[e]ven statutes passed by the House of Representative commonly look[] to the executive orders and Presidential speeches for their inspiration and legal base." *Id.* at 507. Given the discrepancy in meaning between Law 8 and Government Regulation 41, we conclude that these rules do not exist in the hierarchal relationship described by KBC's expert's declaration.

[19] Pertamina introduced testimony that its long-standing practice has been to hand over funds from PSCs directly to the Republic of Indonesia through a transfer to the Federal Reserve Bank of New York. *See* Decl. of Ainun Na'im ¶ 23 (noting that "standing instructions to [Bank of America exist] to pay its Production Sharing Percentage to the account of the Government of Indonesia"); Supp. Decl. of Sahala L. Gaol. 113 (same). Such standing instructions were given in March 1997, prior to the Swiss arbitration in the case at bar. *Id.*

does not blunt this comity concern. *See Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as *parties* or as sovereigns with a coordinate interest in the litigation." (emphasis added) (citing *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895))). Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas. The Republic of Indonesia, of course, insists that Pertamina's reading of the relevant Indonesian law is correct. We thus conclude that Pertamina does not own any portion of the disputed funds, with the exception of the Retention. Like a trustee, Pertamina possesses the remaining funds but has no ownership interest in them. *Cf. Wulff v. Roseville Trust Co.*, 164 A.D. 399, 404-05, 149 N.Y.S. 683, 687 (1st Dep't 1914) ("Property which a debtor holds in trust for others . . . is not subject to an attachment issued against his property.").

C. The Retention

Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention. "[U]nder New York law, a defendant has an interest in . . . funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.*, 970 F.Supp. 212, 217 (S.D.N.Y.1997) (citation and internal punctuation omitted); *accord Leon v. Martinez*, 84 N.Y.2d 83, 88 n. 1, 638

N.E.2d 511, 513 n. 1, 614 N.Y.S.2d 972, 974 n. 1 (1994) ("An assignment may properly relate to a future . . . right which is adequately identified. . . ."). As property within Pertamina's control, which only Pertamina controls, the Retention is validly subject to attachment.

CONCLUSION

The district court correctly adjudicated the relative ownership interests of the Republic of Indonesia and Pertamina. We therefore affirm the district court's order granting KBC's motion to attach the Retention, and denying KBC's motion to attach the remainder of the disputed funds. Because this is not an appeal from a final judgment, proceedings in the district court will presumably move on to other matters. We direct the district court, in the course of those proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Nov 24, 2004]

No. M-18-302 (TPG)

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

against

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS
BUMI NEGARA ("Pertamina"),
Respondent.

OPINION

---

[2] THE COURT: Let me just dictate a ruling from the bench.

I want to in a sense incorporate by reference the statement I made on the record yesterday beginning at page 159 and concluding on page 164.

MR. PANOPOULOS: Your Honor, it is difficult to hear you. I'm sorry.

THE COURT: I am sure that's right. I wasn't even looking out.

I want to incorporate by reference in what I say now the statement that I made beginning at page 159 of the transcript yesterday and concluding on page 164.

What this proceeding is about is what we have referred to as the unadjudicated accounts. The reason that terminology is used is that out of the several accounts at New York banks

that were set up to handle sales of petroleum products coming out of Indonesia, certain of those accounts were the subject of a ruling which I made in April 2002 and were the subject of a Court of Appeals ruling which was handed down in December 2002.

At that time, meaning in April 2002, I was of the view that there was not enough evidence to permit an adjudication of property rights with respect to certain accounts, and they have henceforth been called the "unadjudicated accounts." That terminology will no longer apply after this afternoon because the court is proceeding to adjudicate these remaining accounts. [3] To the extent that I am not making any ruling about certain of the unadjudicated accounts, the reason is that with respect to certain of them there are no issues.

The record reflects in prior rulings that the problem in this litigation arises from the fact that petitioner KBC served restraining notices on the banks with respect to the accounts in question; that is, the adjudicated accounts and the so-called unadjudicated accounts. These restraining notices were served in February 2002.

[4] THE COURT: The purpose of the service of these restraining notices was to proceed with the enforcement of a large judgment, which had been entered in a federal court in Texas. That judgment was on appeal to the Fifth Circuit, but no supersedeas bond had been posted, and therefore, KBC was free to proceed with the enforcement of that judgment.

What I am putting on the record this afternoon will not in any degree attempt to deal with the amounts of money which have been at issue. It will not attempt to present a chronology of all that has occurred in this enormously complicated litigation. It will simply deal with the essential issue which needs to he disposed of. From the very start, the principal issue in controversy regarding these accounts has been the result of the tact that KBC's judgment in this case, obtained

in the federal court in Texas, is against the respondent Pertamina, a company in Indonesia owned by the Indonesian government. KBC of course can enforce its judgment only against the property of Pertamina.

The main issue has been the degree to which the moneys in the accounts were the property of Pertamina or were the property of the Republic of Indonesia. The republic has been permitted to appear in this proceeding to protect its rights. It has been permitted to appear in the district court, and it has been permitted to appear in the Court of Appeals for the Second Circuit.

[5] In connection with the adjudicated accounts, what was held by the district court and was affirmed by the Court of Appeals was that funds in these accounts, nominally paid to Pertamina, after the subtraction and payment by the banks of expenses and also the share or shares of joint venturers, what the Court held was that that amount belonged to the government of Indonesia except for what is called the retention fee. The District Court and the Court of Appeals relied on a regulation which provided that this amount of money less the retention fee shall be the government's portion. And I'm quoting the English translation of the Indonesian law, and it has this phrase "the government's portion."

It is of some interest now to note that under Indonesian law, after Pertamina received the retention fee, or was credited with the retention fee, Pertamina was required to pay a tax out of that retention fee and to pay a dividend to the Republic of Indonesia. Both the tax and the dividend were to be paid to the Republic of Indonesia. Despite the fact that Indonesian law required the payment of the tax and the dividend, the District Court and the Court of Appeals did not hold that the tax and the dividend were the property of the government. These courts did not hold that the tax and the dividend were part of the government's share of the moneys in question. What was held in substance was that the

obligation to pay the tax and the obligation to pay the dividend meant [6] that Pertamina had to pay those amounts out of the retention fee, but that did not mean that the full retention fee was not the property of Pertamina. Those amounts were not property of the government until they were paid.

This is not an astonishing proposition. If a taxpayer earns a salary, the salary belongs to the taxpayer. It doesn't instantly belong to the government, although the taxpayer may ultimately owe the government a tax. If a corporation becomes obligated by a corporate resolution to pay a dividend, the revenues coming into the corporation are not the property of the shareholders the minute they come in. They become the property of the shareholders when the corporation pays the dividend.

So the only thing that was held to be the property of the government was what was referred to as the government's shame of those moneys which had come into the bank accounts and were left after paying expenses to Mobil Oil or shipping companies and so forth.

Now we come to the issues before us on the so-called unadjudicated accounts. What constitutes the principal controversy on the unadjudicated accounts, if not the sole controversy, relates to products refined from crude oil at certain refineries. The first of these is the Cilacap refinery, and there is a claim that the total of $387 million has flowed into the relevant bank accounts resulting from sales [7] of refined products from the Cilacap refinery, and it is contended that this $387 million was subject to the restraining notices. The bank account or bank accounts involved in those Cilacap funds are at the Bank of America. Was it one account or two accounts?

MR. DUGAN: Just one account, I believe.

THE COURT: One account. OK. So there was one account in the Bank of America, relating to Cilacap. And EXOR, was there one account or two accounts?

MR. DUGAN: One account there as well, your Honor.

THE COURT: What about MUSI?

MR. DUGAN: One account there as well. MUSI and EXOR are at Bank of New York.

THE COURT: So we have an account at Bank of New York relating to the refinery called EXOR, and, again, the funds involved sales of refined petroleum products refined from crude oil. The amount claimed to have flowed through that account and that was subject to the restraining notices is about $63 million. It appears that there is a controversy by the government of Indonesia on the EXOR account only as to about $38 million. But there is a substantial dispute nevertheless about the EXOR account.

Finally, there is the MUSI refinery account at the Bank of New York, and it is claimed that the amount of funds there which are subject to the restraining notices is about a [8] million and a half.

The statement I'm making is not intended to be a complete accounting of the unadjudicated accounts. There are certain accounts where no money has been seized, certain accounts where apparently there is no controversy. So the complete accounting for the unadjudicated accounts will come in some other form and I'm not going to attempt to deal with it in this statement. What I am trying to deal with is merely the issues in controversy about Cilacap, EXOR, and MUSI. And it can be said in order to simplify things that the issues are exactly the same with Cilacap, EXOR, and MUSI. So that I do not need to draw any distinction among those three accounts.

KBC contends that all of the money that flowed into those accounts was the property of Pertamina and, assuming a

proper calculation of the time period and other subsidiary matters perhaps, basically all of the funds flowing through these accounts were the property of Pertamina and subject to the restraining notices.

The government of Indonesia asserts that all of the funds belonged to the government of Indonesia. Pertamina takes the same position as the government. I don't think there will be any confusion on nomenclature. At various times in this litigation, we have referred to the republic, At times we have referred to the ministry of finance. In the hearings in the last two days we have talked mainly in terms of the government, [9] and I will probably speak in that fashion in my statement now.

When resolving the question of who the funds belonged to, the Court is looking to Indonesian law, as the Court did in connection with the earlier adjudicated accounts. But when the crucial factors are considered, Indonesian law is really no different from New York law. This was made abundantly clear the discussion held on the record yesterday morning, and it is clear from the voluminous papers submitted on the motions before the Court.

Incidentally, I neglected to say exactly what motions are before the Court. However, it is sufficient to simply state that there is a motion by KBC seeking to have the Court declare that the moneys passing through the Cilacap, EXOR, and MUSI accounts belonged to Pertamina and were subject to the restraining notices. The republic for the government of Indonesia has filed an appropriate motion seeking a declaration that those funds belonged entirely to the government. Pertamina, as I have said, is on the same side of this controversy with the government.

So we are at the question of, Who did the funds belong to. I started to describe the basics of the law. I will continue with that. Much of what I will say now is so obvious that anyone

reading this would hardly think it worth saying, but in the context of the issues here, this has to be said. Although Pertamina is a company owned by the government of [10] Indonesia and although its activities in the oil industry are subject to very thorough regulation, nevertheless, Pertamina is a separate company, separate from the government of Indonesia as an entity. This was recognized in the earlier phases of this litigation, and the fact is still true. Pertamina can enter into contracts. Pertamina has its own bank accounts, in its own name. The contracts it enters into are in its own name. Pertamina sells petroleum products in its own name. It receives payments in its own name which go into its own bank accounts. Parties in Indonesia and parties abroad can do business with Pertamina. They can sell equipment and raw materials to Pertamina. The government itself, according to the record, sells crude oil to Pertamina. And Pertamina buys crude oil from the government in Pertamina's name, and undoubtedly owes the government the price for that oil. If a party enters into a transaction with Pertamina, for instance, selling Pertamina equipment or building facilities for Pertamina, Pertamina will be obligated to pay for that equipment or those facilities. If Pertamina should fail to pay, Indonesia has a judicial system which will entertain a lawsuit if that is necessary between the supplier and Pertamina.

It was conceded, as one would expect, that Indonesia has a law system, the same as the rest of the civilized world. If someone claims that Pertamina is wrongfully withholding [11] payment on an obligation, for instance, for the sale of equipment or for the construction of facilities, that party has legal recourse against Pertamina in Indonesian courts. If that party wins, that party can get a judgment against Pertamina.

That party does not sue the government of Indonesia. The government of Indonesia would lodge the strongest possible objection if the party sued the government on the basis of an obligation of Pertamina. So if the supplier, the party I'm

talking about, wins a lawsuit, the party can get a judgment and can enforce that judgment. If Pertamina refuses to pay, that party can enforce the judgment by levying on property of Pertamina including bank accounts. This is of course in accordance with legal systems throughout the civilized world and Indonesia is no exception.

Pertamina has financial statements. These financial statements are included in reports. These financial statements, like the financial statements in the United States or elsewhere, have balance sheets and income statements. Pertamina has its assets. And the assets are listed as such. They are not listed as assets of the government of Indonesia.

Pertamina has liabilities, and they are listed as such. They are not listed as liabilities of the government of Indonesia. Pertamina has income listed as such. It is not listed as income of the government of Indonesia. It has expenses listed as such. These are not listed as expenses of the government of [12] Indonesia.

Pertamina seeks financing, sometimes abroad. And these financial statements are used to help obtain financing. Needless to say, Pertamina does not seek financing by saying it is not liable for anything and only the government is liable, who is not a party to the contract in question.

Pertamina has debt obligations. And parties have a right to look to. Pertamina on those debt obligations.

So all of this is in accordance with Indonesian law, Indonesian accounting practices. And these are the basics of the law and the accounting practices which exist.

Now, Pertamina sold refined petroleum products out of the refineries I mentioned. These products were exported and sold abroad. Purchasers paid for these products, and they paid Pertamina. And the funds that were paid were, according to agreement, deposited in the account at the Bank of America

and the accounts at the Bank of New York. Expenses were paid under the administration of the banks. If there were any joint venturers, the joint venturers' shares were paid. In other words, whatever was needed to pay parties other than Pertamina was taken out of the funds and paid by the banks. What was left was in Pertamina's name and this was the net receipts after paying outside parties whatever they were due.

The funds were duly transmitted, or were subject to transmission, from the New York banks to bank accounts of [13] Pertamina in Indonesia.

Here let me pause to reset to a complication which I do not want to describe in detail, but let me try briefly to state the necessaries. The amount of money which ended up literally staying, or being lodged in the New York banks was limited to the amount necessary to pay the judgment plus interest. This was done under the guidance of the Court of Appeals and also was implemented by the District Court and evolved in various ways that are not necessary to be described. So the amount actually lodged in New York banks pursuant to the restraining notices is a little over $300 million.

There are no funds from Cilacap, EXOR, or MUSI literally held up in New York banks. But the effect of court rulings and agreements is that if the Court decides that these funds were subject to restraint, the amounts that I have talked about as having flowed through these accounts will be deemed to be available to be applied to the judgment. This is not a perfect description, but it is as far as I'm going to go now. But this is why I have referred to the fact that amounts of money have flowed through the accounts. And that's what has happened. And the issue is, when those moneys flowed through the accounts, to whom did they belong? Pertamina or the government of Indonesia? If they belonged to Pertamina, they were subject to the restraining notices. If they belonged to the government of Indonesia, they were not subject to the [14] restraining notices.

I'm going back to the flow of the funds. As I said, the funds, after payment of expenses to outside parties, were in Pertamina's name. They were transmitted to Pertamina in Indonesia. There is no suggestion that these funds or any portion of them were paid to the government of Indonesia or seized by the government of Indonesia in any way because of some property interest asserted in these particular funds by the government. That was not done. This is a completely different picture from what was presented in connection with the adjudicated accounts.

These funds, in connection with Cilacap, EXOR, and MUSI, simply became part of the general funds of Pertamina, as well as receipts from other sales, and were used to pay the various expenses of Pertamina.

The record contains a financial statement of Pertamina for the year 2001. It shows a balance sheet as of December 31, 2001, and it shows a consolidated statement of income for the year ending December 31, 2001. There is also a statement for an earlier period, but I'm going to concentrate on the 2001 balance sheet and income statement.

The balance sheet lists assets of Pertamina. They include cash on hand in banks of about 20 trillion Indonesia rupiahs. Various other assets that one would expect are listed. The total assets are listed at what appears to be [15] about 96 trillion rupiahs. The figure is a little bit hard to read, but I believe it's about 96 trillion rupiahs.

The balance sheet, of course, lists liabilities and shareholders equity. Total current liabilities are listed at about 30 trillion rupiahs. Other liabilities appear to be about 37 or 38 trillion rupiahs. Stockholders equity is listed as about 28 trillion rupiahs. Total liabilities and stockholders equity is listed at about 96 trillion rupiahs. These are all listed as assets and liabilities and equity of Pertamina. They are not listed as assets and liabilities and equity of the government of Indonesia.

Now, in the consolidated statement of income, there is, as one would expect, a list 'of revenues and a list of expenses. The revenues for the year 2001 were about 212 or 213 trillion rupiahs. The figure is hard to read, but that is about it.

These revenues for 2001 included, as one would expect, the revenues from the export of oil products, the kinds of things which were going on with the Cilacap, EXOR, and MUSI accounts. The amount for 2001 was about 14 trillion rupiahs. The income statement, of course, listed expenses. The items under expenses total about 201 trillion rupiahs. The item labeled "profit before government share" is listed as about 10 1/2 trillion rupiahs. It appears that, pursuant to certain legal provisions which came into effect when Pertamina was [16] started, that the government was entitled to a share of these profits. That share is listed for 2001 as about 6 trillion rupiahs.

The net profit after all things are considered is listed as about 4 1/2 trillion rupiahs.

All of these items are listed as revenues, expenses, profits, and so forth of Pertamina. And one would expect this to be done, in view of the fact that Indonesian law, as I have described, is not some weird concoction. It is in accordance with the law of the civilized world, and its accounting practices are of the same nature.

Now we come to the argument of the government. The argument of the government was summarized by me to a very substantial extent in the pages I referred to from yesterday's transcript, pages 159 through 164. Almost all of the factual basis for the government's argument is something that I accept. Pertamina, as I have said, is a company owned by the Indonesian government. It is heavily regulated by the Indonesian government. But the argument of the government in this proceeding is based on a quite specific set of circumstances. Indonesia, pursuant to clear law, has a program, or a

policy, under which petroleum products are furnished to the people of Indonesia at prices which are set by the government and are based on a practice of government subsidies. This is referred to as the BBM program or policy. Pertamina participates in [17] this program, as it is directed to do by law. And in participating in this program, Pertamina is obliged to act for the benefit of the Indonesian government and the people of Indonesia. Under this program, Pertamina refines crude oil, turns it into products such as gasoline and fuel oil, and Pertamina sells these products either directly or indirectly to domestic purchasers in Indonesia. The record shows that to some extent the crude oil used in this program is lifted out of the ground by Pertamina, to some extent is lifted out of the ground by other parties, including the government of Indonesia or joint ventures between the government of Indonesia and other parties. Where the government of Indonesia is involved in lifting crude oil and selling it to Pertamina, this is a sale by the government of Indonesia to Pertamina, and Pertamina pays the government for that crude oil.

Pertamina must sell the refined products at prices which accord with the regulations or policies of the BBM program. The program has been described on the record here as being for Pertamina a no-loss and no-profit situation. Although there may be technical exceptions to this basic concept that are suggested in parts of the evidence, the government and Pertamina assert that the BBM program was indeed a no-loss and no-profit program as far as Pertamina was concerned, and the Court accepts that basic proposition. This means that if, for a relevant period, Pertamina was selling [18] products to domestic purchasers in Indonesia and was making a profit, then that profit would need to be paid to the government of Indonesia. On the other hand, if Pertamina was selling at prices which resulted in a loss to Pertamina, then the government would pay a subsidy to Pertamina to cover that loss. The calculation of profit or loss would be made by the method one would expect—that is, taking the costs to

Pertamina in connection with this program—that is, the cost of raw materials, the cost of refining, etc.—and then taking the revenues and determining which was larger. If the revenues exceeded the costs, there was a profit. If the revenues were less than the costs, there was a loss.

Now, here, it is necessary to deal with the circumstance, which is basically the main factor in the government's argument and Pertamina's argument, that revenues from export sales belonged to the government of Indonesia. The export sales were non-BBM sales. They were not subsidized. There were also some non-BBM domestic sales. All the non-BBM revenues were used in the calculation of whether there was a profit or loss in the BBM program. That is, even though the export sales were not BBM sales, and even though there were some domestic sales that were not BBM sales at the fixed prices, nevertheless, the revenues for such non-BBM sales were used in the calculation of whether there was a profit or a loss on the BBM program.

[19] One thing that has been said is that these revenues were a proxy for BBM costs. I am not sure what that means, but basically what happened is that these revenues were applied to reduce the BBM costs. Another way to put it is simply that they were added to the revenues on the BBM program. It's all the same thing.

If one wonders what happened to the costs associated with the non-BBM sales, the answer that has been given to the Court is that there were unitary costs and there were no specific costs associated, additional costs associated with the non-BBM sales. Exactly how that was accomplished is an accounting matter. It has not been gone into. But the Court does not doubt that that type of accounting would be quite legitimate.

So the non-BBM revenues were used as I have just described, and since we are concerned in our proceedings

here with the non-BBM revenues derived from export sales, I will probably concentrate to some extent on those particular revenues in further discussion.

Now, in the consolidated statement of income for the year 2001, there is an item listed under Revenues entitled "reimbursement of fuel expenses from the government." And in the year 2001, that was about 61 trillion rupiahs. The record does not show exactly how that was calculated, but it is conceded by Pertamina that the method of calculation is what I [20] described a few minutes ago—that is, taking the costs of BBM sales and the revenues from the BBM sales, and then taking the revenues from the non-BBM sales to add to BBM revenues or reduce BBM costs and netting out what results from those figures. And for 2001, what netted out was 61 trillion rupiahs.

Pertamina and the government urge that because the BBM program was for the benefit of the government and for the people of Indonesia and because the export sales revenues were used in the calculation of profit or loss from that program, this means that the revenues from the export sales were the property of the government of Indonesia from the moment that they were earned.

This brings me to my conclusion. I conclude that Pertamina and the government have drawn an incorrect conclusion. The fact that the revenues from the export sales were used in the calculation of BBM profit or loss in the way I have described. this fact under no circumstances means that those revenues belonged to the government of Indonesia at any time, when they were passing through the banks in New York or at any time.

The fact that these revenues from the export sales were used to calculate Pertamina's profit or loss on the BBM program is indeed a very strong indication that these revenues belonged to Pertamina. The government of Indonesia, in

2001, [21] paid a very large subsidy. The reason the subsidy was not 14 trillion rupiahs higher than the 61 trillion rupiahs is because the government considered that the 14 trillion rupiahs from the export sales belonged to Pertamina and reduced the costs of the BBM program to Pertamina that is, reduced Pertamina's costs. This is totally inconsistent with any idea that the 14 trillion rupiahs belonged to the government of Indonesia.

There is nothing about the BBM program or the accounting for it which takes away in the slightest from the fact that these revenues from the export sales belonged to Pertamina, were available to Pertamina to put in its bank accounts, were available for use by Pertamina to pay its expenses. None of that is in any degree contradicted by what has been asserted and what I have found about the BBM program.

Now, in addition to the use of the revenues to calculate the subsidy of 61 trillion, which is shown in the income statement of 2001, the 14 trillion was a line item in the income statement. The specific use of the 14 trillion in calculating the subsidy is not shown. That calculation is not shown and is not in any paper that is on the record here, although the method of that calculation has been conceded.

But, in addition to using the 14 trillion in a perfectly obvious way to calculate the subsidy due, the 14 trillion rupiahs was listed as a line item in the consolidated statement of income. The 14 trillion rupiahs had been received [22] by Pertamina from the export sales. And those 14 trillion rupiahs are shown as a line item on the statement of income. It's there. This is not something dreamed up by anybody. The statement of income simply does include, in black and white, 14 trillion rupiahs as revenues from the export sales. That 14 trillion rupiahs is used as one of the items adding up to the total revenues of 212 trillion rupiahs. It is used as part of the calculation leading up to the ultimate figure of profit before the government's share, and so forth.

This is in accordance with proper accounting practices. Nobody suggests that this financial statement was in any way fraudulent or incorrect. Nobody suggests that it is not in accordance with both Indonesian law and Indonesian accounting practices.

For these reasons, I conclude that it is clear beyond any shadow of a doubt that the export revenues flowing through the Cilacap, EXOR, and MUSI accounts were funds belonging to Pertamina which were subject to the restraining notices involved in this litigation. The matter indeed is not really complicated. The arguments of Pertamina and the government really made no showing of any substantial reason why this conclusion is not the right conclusion.

That concludes my ruling on the law, and we will now go to something else.

[23] SO ORDERED.

Dated: New York, New York
October 6, 2004

/s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

In the Matter of:

KARAHA BODAS CO., L.L.C., v.
PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI

Trial Volume 1
October 5, 2004

SOUTHERN DISTRICT REPORTERS, P.C.
500 PEARL STREET
NEW YORK, NY 10007
(212) 805-0300

---

[159] Now, let me address the issue we are about. I think that the exhibits before me and the written materials establish that there was and is this BBM program. I think the materials establish that the operations of Pertamina were very largely in furtherance of that program and that the program was [160] established by the government of Indonesia and Pertamina's operations in that program are pursuant to the laws of Indonesia, decrees, regulations, whatever. I think the materials before me establish that the sales that are at issue here, which yielded the funds that are now tied up, they came from what has been referred to as non-BBM business. But I think the materials establish that this business was not totally outside the BBM framework but that what was done and what was intended, what was legally decreed is exactly what Pertamina and the ministry say, that the revenues from those sales were used, were in effect treated as BBM revenues so as to offset BBM costs. And the purpose of this was to have that type of application so as to ultimately determine the ultimate question. That is, for some period in question, and I'm not exactly sure whether the period is at the end of a month or the end of a year or the end of a quarter, but at the end of some period, it was intended and established by law that there

would be a determination of whether Pertamina had made a profit or incurred a loss after taking into account all Pertamina's revenues, both from BBM sales and from non-BBM sales, and taking into account all of Pertamina's expenses. And those revenues and those expenses are reflected in the earnings statements of Pertamina. And they involve very, very large total amounts of money. I think the materials before me establish that if Pertamina incurred a loss, then the [161] government of Indonesia in some way paid Pertamina to cover that loss. Now, I'm not entirely sure of that, because there is some evidence that the government may have made up the difference between the BBM price, the fixed price to the Indonesian consumers and the market price. So I'm not completely sure of exactly what occurred in connection with what I have just said. But the principle is really not different. Regardless of the exact mechanics, I think the evidence shows that the government was making up the loss.

Now, the weight of the evidence is that if Pertamina made a profit, then it had to pay the profit to the government, although there is some question about that that is raised by a document introduced by KBC. But, again, for our ultimate question, in my view, that does not make a difference in the principle that we have to deal with.

So what I'm saying to you is that there is no reason, in my view, to introduce further evidence to support what I have said. I accept the idea that all of what I have said was done for the benefit of the Indonesian government and the Indonesian people, the Indonesian government representing the Indonesian people, that all of the activities of Pertamina were designed to further those governmental objectives. And I don't need to cite a great many specific instruments. There are plenty of governmental legal instruments which display what I have said, as far as I know.

[162] Now, what's the issue that remains? In my view, none of that solves the issue before the Court. And what I'm

coming to now, of course, is in my view the controversy. The question, in my view, is, what is the effect of this circumstance? Pertamina was and is a company. Pertamina, even according to the documents most heavily relied on by Pertamina and the government, Pertamina, for one thing had assets. This directive 105 has a section, section 3, about Pertamina's balance sheet, and it speaks of Pertamina's assets. It speaks of Pertamina's liabilities. Now, is the idea that these were assets but not assets? Were they something, was this a façade? Were these financial statements created with some hidden meaning that assets don't mean assets? These financial statements were undoubtedly used for many purposes by Pertamina, including getting financing in connection with its operations. Were they giving out these financial statements and having some hidden meaning? The financial statements have earning statements showing revenues of Pertamina, showing expenses of Pertamina. Were these not revenues of Pertamina? Were these financial statements, which were undoubtedly given to companies relying on them, was there some hidden meaning so that the revenues did not mean revenues of Pertamina and expenses did not mean expenses of Pertamina? Why does directive 105 talk about assets if there were no assets?

So, granted that at the end of some day, whether it's [163] at the end of the month or the end of a quarter or the end of a year, granted that there was to be a reckoning so that there had to be figuring of whether there was a profit or a loss to Pertamina, that profit and loss was figured on the basis of calculating the revenues of Pertamina versus the expenses of Pertamina. How else does one figure whether Pertamina has a profit or loss? Now, if they weren't revenues of Pertamina, there would be a very odd accounting. I would not know quite what kind of an animal to call that. Then I suppose you would have to say, well, the costs were not costs to Pertamina. They were simply the costs of the governement. Then why is the

government figuring whether there's a profit or a loss? It would be a very, very odd arrangement.

So the issue in my mind is this. While the revenues were coming in from these export sales and while they were going to Pertamina and while, as we discussed this morning, while they could be used as part of the funds to pay the obligations of Pertamina, while they could be used to back up contracts entered into by Pertamina, while Pertamina could spend that money, could put it in Pertamina's bank account, while all that was going on, is it or is it not the case that Pertamina, that it was Pertamina's money and that Pertamina could use it to pay any obligation that Pertamina had? Can it not be used to pay the obligation to KBC? And if such money is restrained in a New York bank account or comes through a New [164] York bank account, can it not be restrained to pay this obligation?

So what I'm trying to say is, most of what Pertamina and the republic have presented I accept. You do not need to spend any more time putting on evidence of that. What I do not accept without further exploration is a conclusion that because of those circumstances, Pertamina had no ownership interest in those funds and the government had the sole ownership of those funds. And that issue revolves, in my view, upon what ocurred with respect to who had the ability to spend the money, how the money was accounted for in a financial statement, and so forth and so on. And none of that, those issues are not even touched by this discussion of the BBM arrangements and so forth.

So try to come back tomorrow and focus on these issues, and don't take time in having a lot of testimony about things which I really accept. So we'll see you at 10 o'clock tomorrow.

MR. SLATER: Thank you, your Honor.

(Adjoured to 10:00 a.m., Wednesday, October 6, 2004)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-MC-00098 (TPG)

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("Pertamina"),
Respondents.

FINAL JUDGMENT

1. On December 4, 2001, the United States District Court for the Southern District of Texas entered judgment (the "Texas Judgment') in an action between Karaha Bodas Company, L.L.C. ("KBC") and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero) ("Pertamina"), confirming an UNCITRAL arbitration award requiring Pertamina to pay KBC a total of $261,166,654.92, plus interest at the rate of 4% per annum from January 1, 2001 until full payment. The United States Court of Appeals for the Fifth Circuit affirmed this judgment, and on October 4, 2004, the United States Supreme Court denied Pertamina's petition for writ of certiorari.

2. The Texas Judgment was registered in and became a judgment of this Court on February 22, 2002. On February 22, 2002, this Court issued writs of execution and restraining notices pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules requiring, *inter alia*, Bank of America, N.A. and

The Bank of New York to restrain certain funds that flowed through 24 trust accounts maintained in Pertamina's name at those banks in this District (such accounts, the "Trust Accounts").

3. Bank of America and The Bank of New York established 24 restraining accounts corresponding to the Trust Accounts in which to keep restrained funds (such accounts the "Restrained Accounts").

4. The Ministry of Finance of the Republic of Indonesia ("Ministry") challenged the District Court's jurisdiction under the Foreign Sovereign Immunities Act to restrain the funds, claiming that under Indonesian law the funds belonged to the Government of Indonesia and not the judgment-debtor Pertamina.

5. On April 24, 2002, the District Court issued a Final Order determining ownership of the funds restrained in fifteen of the Restrained Accounts located at Bank of America in New York (the "Adjudicated Accounts"). The April 24 Final Order held that with respect to these fifteen Adjudicated Accounts, which restrained revenues from the sale of Indonesian Liquefied Natural Gas ("LNG"): (1) Pertamina had a property right in those accounts to the extent of its Retention Fee and KBC could execute only upon an amount of the funds equal to the Retention Fee; and (2) the remaining LNG revenues were the Government's portion and cannot be executed upon by KBC. The Court certified the ruling for interlocutory appeal and stayed its ruling pending the appeal. At the time of the April 24 Final Order, the amount of revenues restrained in the Adjudicated Trusts was $292,874,622.17.

6. The April 24 Final Order did not determine ownership of the funds restrained in the remaining nine Restrained Accounts because the record at the time was insufficient to determine whether KBC was entitled to execution against those accounts. These nine accounts were subsequently denominated as the "Unadjudicated Accounts." (the Adjudi-

cated and Unadjudicated Accounts together make up the Restrained Accounts.)

7. KBC, Pertamina, and the Ministry appealed the April 24 Final Order and the Ministry moved to lift the stay to the extent of the amount of funds belonging to the Government. On June 18, 2002, the U.S. Court of Appeals for the Second Circuit issued an Order modifying the District Court's stay to apply only to sufficient funds to satisfy the judgment and maintaining the stay only as to funds up to the amount of KBC's Judgment. As a result of the Second Circuit's order, the amount of funds restrained in the Adjudicated Accounts over and above the amount of the judgment, plus interest, was released. The amount of revenues left restrained in the 15 Adjudicated Accounts on that date equaled $276,633,524.59. The Second Circuit's order did not affect the nine Unadjudicated Accounts, and the amount of funds in those accounts continued to grow as funds payable to Pertamina from the corresponding Trust Accounts were restrained in the Unadjudicated Accounts pending adjudication of the funds' ownership.

8. In an opinion issued on December 10, 2002, the Second Circuit affirmed the District Court's April 24 Final Order. Because the appeal was interlocutory and proceedings in the District Court would continue, the Second Circuit directed the District Court to continue the stay in force or to substitute one similar until such time as the parties' rights to the disputed funds were finally determined. The District Court then undertook to determine the amount of the Retention Fee associated with the funds restrained in the Adjudicated Accounts that could be executed upon, and to adjudicate ownership of the funds restrained in the nine Unadjudicated Accounts.

9. On March 18, 2004, this Court issued an Order modifying the restraining notices and requiring Bank of America to restrain funds equal only to the amount of the Texas

Judgment plus accrued interest. The March 18 Order was entered without prejudice to the parties' positions in the litigation for the purpose of maintaining sufficient security for KBC's judgment and releasing to the Ministry funds not required for such security. The March 18 Order required, *inter alia*, (1) the release to the Ministry of all funds restrained in excess of the amount of KBC's judgment plus interest, and (2) that only funds equal to the amount of the Texas Judgment plus accrued interest was to be left restrained in the fifteen Adjudicated Accounts at Bank of America, plus whatever additional amounts would be necessary to true up accrued interest. The funds kept restrained were to be treated as security for such amounts, if any, as were finally held in further proceedings in this Court and on appeal to belong to Pertamina and to be subject to execution against Pertamina from among the funds that passed through the Trust Accounts since February 22, 2002.

10. The March 18, 2004 Order further provided that if the Texas Judgment is finally affirmed, the amount restrained at Bank of America would be paid to KBC to the extent it is finally determined on appeal that funds passing through the Trust Accounts or restrained in the Restrained Accounts which belong to Pertamina and are subject to restraint are at least equal to the amount of the Texas Judgment plus interest. If it is determined that the amount belonging to Pertamina and subject to restraint is less than the amount of the Texas Judgment plus interest, the March 18 Order provided that the difference would be paid to the Ministry.

11. At various times, this Court has ruled that certain of the funds flowing through the Trust Accounts or restrained in the Restrained Accounts are the property of Pertamina and properly restrained and executable by legal process (such funds, "Executable Funds"). Specifically:

(a) On January 29, 2004, this Court issued an opinion ruling, among other things, that the restraining notices

on the Trust Accounts corresponding to the Adjudicated Accounts continued to be effective under N.Y.C.P.L.R. § 5222(b) even after the Bank of America trustee stopped restraining further amounts in the Adjudicated Accounts as a result of the amounts restrained in those accounts reaching double the amount of the judgment or the Second Circuit's June 18, 2002 Order. According to the Opinion, as Retention Fees passed through the corresponding Trust Accounts, they would be deemed restrained even though the trustee did not literally withhold those funds in the Adjudicated Accounts, such that an equivalent amount from the funds already restrained in the Adjudicated Accounts would be considered as becoming Retention Fees. Thus, the January 29 Opinion held that the restraints applied to $178,161,403, which the Court determined to be the amount of Retention Fees earned in respect of the funds that passed through the Trust Accounts corresponding to the Adjudicated Trusts from February 22, 2002 to the end of 2002, as well as to any Retention Fees earned thereafter, and that KBC was entitled to restrain and execute on this amount.

(b) On May 19, 2004, this Court issued an Opinion ruling, among other things, that Pertamina continued to earn a Retention Fee with respect to the Adjudicated Accounts, albeit in a reduced amount, until November 21, 2003. The May 19 Opinion further held that $132,992,871 of the funds that had passed through the corresponding Trust Accounts in 2003 represented the Retention Fees earned in respect of the those accounts in 2003 and, for the same reasons provided in the January 29 Opinion, that amount was deemed restrained in the Adjudicated Accounts and executable.

(c) On October 6, 2004, this Court orally ruled that Pertamina had a property interest in an additional $8,384,679 and $3,690,000 of the revenues in the

Unadjudicated Accounts that had been restrained from the sale of natural gas products because such amounts constituted, respectively, the amount of the 2002 Retention Fee earned in respect of the West Natuna, Corridor, and KMI Trust Accounts and the amount of Pertamina's participating interest in the contractors' share of the West Natuna Kakap Block PSC.

(d) On October 6, 2004, this Court also orally ruled that all funds that had been restrained and subsequently released from the Unadjudicated Accounts corresponding to the Cilacap, EXOR I, and MUSI II Trust Accounts and, after release, passing through the Cilacap and MUSI II Trust Accounts, through the date of this judgment, totaling $452,736,910, belong to Pertamina.

12. The amount of the judgment as of October 6, 2004, including simple interest at the rate of 4%, was $300,498,637.52. The amount as of October 6, 2004 restrained in the Adjudicated Accounts at Bank of America pursuant to the Court's March 18, 2004 Order was $301,051,979.84.

13. As a result of the above-described rulings, this Court hereby finds that the amount of Pertamina property restrained and/or deemed restrained in the Adjudicated and Unadjudicated Accounts since February 22, 2002 totals $775,965,863, and that this amount of Executable Funds exceeds the Texas Judgment plus accrued interest.

14. On October 6, 2004, this Court ordered Bank of America to release immediately $29,318,992—representing the $3,690,000 held to be Pertamina's participating interest in the West Natuna Kakap Block PSC, and $25,628,992 of the funds from the EXOR I account—to KBC. The amount of the judgment on October 12, 2004 (the date of the release of $29,318,992) is $300,669,894.32. Consequently, the unpaid amount of the judgment, as of October 12, 2004, is $271,350,902.32.

15. As a result of the above rulings, Bank of America is hereby ORDERED, pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules, to turn over to KBC $271,350,902.32, plus all accrued interest from October 13, 2004 to the date of full payment.

16. However, Bank of America's obligation to turn over such funds to KBC is hereby stayed until all U.S. appeals and review (if any) by the U.S. Supreme Court of this Final Judgment have been adjudicated or otherwise exhausted, or until further order of this Court.

17. During the period that the foregoing stay is in effect, simple interest at the rate of 4% per annum shall continue to accrue on the unpaid amount of the judgment, and Bank of America shall continue to restrain funds sufficient to pay the unpaid amount of the judgment and all interest that accrues in the future.

Dated this 22nd day of October, 2004.

/s/ Thomas P. Griesa
THOMAS P. GRIESA
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of March, two thousand and six.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Pierre N. Leval,
Hon. Sonia Sotomayor,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos.
04-6551-cv(L)
04-6672-cv(C)

In the Matter of an Arbitration Between

KARAHA BODAS COMPANY, L.L.C.,
Petitioner-Appellee,

v.

BANK OF INDONESIA, Non-Party-Witness,
Garnishee,

v.

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Non-Party-Respondent-Appellant,

PERUSAHAAN PERTAMBANGAN MINYAK DAN
GAS BUMI NEGARA,
Respondent-Appellant.

APPEARING FOR APPELLANT PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA:	HENRY WEISBURG, Shearman & Sterling LLP, New York, NY (Pieter Van Tol, Scott Horton, and Victoria Paladino, Lovells, New York, NY, *on the brief*).
APPEARING FOR APPELLANT MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA:	FRANK PANOPOULOS (Carolyn B. Lamm, R. Shawn Gunnarson, and Eric Grannon, *on the brief*), White & Case LLP, Washington, DC.
APPEARING FOR APPELLEE:	CHRISTOPHER F. DUGAN (James E. Berger, Matthew S. Dunne, Danielle W. Pierce, and Carolyn E. Morris, *on the brief*), Paul, Hastings, Janofsky & Walker LLP, Washington, DC.

Appeal from a judgment of the United States District Court for the Southern District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the district court's judgment is AFFIRMED.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-respondent-appellant Ministry of Finance of the Republic of Indonesia ("Indonesia") appeal from the November 19, 2004 judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) directing the Bank of America to turn over to petitioner-appellee Karaha Bodas Company, L.L.C. ("KBC") funds restrained to secure a money judgment against Pertamina.

We assume familiarity with the facts and procedural history and provide only a selective recitation here. On February 22, 2002, the district court issued restraining notices requiring several banks in the Southern District of New York to restrain funds deposited into certain trust accounts held in Pertamina's name. Of those, the "refinery accounts" received funds from Pertamina's export sale of refined petroleum products. The parties dispute whether funds flowing through the refinery accounts (the "refinery funds") were Pertamina's, and therefore subject to restraint and execution, or Indonesia's, and therefore not subject to restraint or execution. Because the amount that flowed through the refinery accounts, roughly $452 million, exceeds the current size of the underlying money judgment, roughly $319 million, a determination that the refinery funds belonged to Pertamina would afford KBC full recovery. We note that the precise funds deposited into the refinery accounts are no longer restrained. As reflected in the district court's March 18, 2004 order, and as confirmed at oral argument, the parties agreed that banks subject to the restraining notices would release all restrained funds to Indonesia except for an amount held in certain restrained accounts at the Bank of America that would be

sufficient to satisfy the underlying money judgment. The parties agreed that these funds would secure KBC's recovery of whatever funds passing through any of the accounts at issue, including the refinery accounts, the court determined to belong to Pertamina.

To determine the ownership of property, we first consider possession. Because the refinery accounts were held in Pertamina's name, Pertamina is their presumptive owner. *See Karaha Bodas Co. v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002). "[T]his presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee." *Id.* Such a relationship would be "established . . . by provisions of Indonesian law uniquely applicable," so we now look to that law. *Id.* at 87.

The appellants contend that the Indonesian "BBM" system establishes Indonesia's ownership of the refinery funds. We disagree. First, although the no-profit-no-loss subsidy of the BBM regime does establish that Indonesia acts like a guarantor of Pertamina's BBM operation, it does not deprive Pertamina of control over the refinery funds. Pertamina is allowed to spend those funds for any purpose, such as building asphalt plants, subject only to budgetary limitations. Second, we find no inconsistency in the fact that Pertamina operates the refineries on behalf of Indonesia for the benefit of the Indonesian people and the proposition that Pertamina owns revenues generated from the sale of its output. In short, Pertamina points to no Indonesian legal directive that deems the refinery funds Indonesia's, *cf. id.* at 90-92, or indicates that upon their receipt, they are anything other than "property within Pertamina's control, which only Pertamina controls." *Id.* at 92. Because the presumption that Pertamina owns the refinery funds is unrebutted, the district court correctly held that those funds belonged to Pertamina and ordered the Bank

of America to turn over the balance of the underlying money judgment to KBC.

For the foregoing reasons, the district court's judgment is AFFIRMED. Because the appellants may seek review in the Supreme Court, KBC's pending motion of July 5, 2005, to vacate the district court's stay of execution and turnover is DENIED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____
Lucille Carr, Deputy Clerk

APPENDIX F

EXCERPTS FROM THE
FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

§ 1603. Definitions

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

* * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under

like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

* * *

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

* * *

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

* * *

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

* * *

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any

other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.